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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

NATIONAL BROADCASTING COMPANY, INC.,
Petitioner

v.

FRANK HERMAN AND FRANK MULLANEY,
Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR CERTIORARI

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QUESTIONS PRESENTED

1. Where challenged hiring decisions required a qualitative choice from among many skilled applicants, and where an employer offered unrebutted evidence that it exercised its business judgment to select the three "best applicants" for the positions, must an employer accused of a "willful" violation of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 621-634, also prove that "the applicants' relative qualifications were such that no employer would have considered age?"

2. Where an employer has met its burden of articulating a legitimate, nondiscriminatory reason for its qualitative hiring decisions with unrebutted proof and has moved for summary judgment, is the plaintiff entitled only to *reasonable* inferences from other "evidence" to establish that the employer's uncontradicted reason was merely a pretext or cover-up for age discrimination?

PARTIES

The caption of the case in this Court contains the names of all parties. Petitioner National Broadcasting Company, Inc., is a wholly-owned subsidiary of RCA Corporation, a publicly-held company. Excluding RCA Corporation's other wholly-owned subsidiaries, the following companies are subsidiaries of RCA Corporation, and hence affiliates of respondent National Broadcasting Company, Inc.: Les Relais de l'Isle de France S.A. (Villejuif); Societe Nouvelle D'Exploitation de Vehicules Industriels S.A. (SNEVI); Hertz Italiana S.p.A.; Hertz Penske Truck Leasing, Inc.; RCA Solid State Ltda.; RVC Corporation; Regard Records Limited; Edizioni Musicali Acqua Azzurra S.r.l.; RCA S.A.; RCA S.A. de C.V.; Editorial Mexicana de Musica, S.A. de C.V.; United Truck Leasing, Inc.

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IN THE

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OCTOBER TERM, 1984

NATIONAL BROADCASTING COMPANY, INC.,
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v.

FRANK HERMAN AND FRANK MULLANEY,
Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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PETITION FOR CERTIORARI

Petitioner National Broadcasting Company, Inc. ("NBC"), respectfully petitions for a writ of certiorari to review the judgment of the Court of Appeals for the Seventh Circuit. Petitioner also submits that summary reversal based on the certiorari papers may be warranted. Rule 23.1.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 744 F.2d 604 (7th Cir. 1984) (Appendix A). The United States District Court for the Northern District of Illinois issued two opinions in this case. The first opinion, granting NBC's motion for partial summary judgment on respondents' charge of

nonwillful age discrimination, is reported at 569 F. Supp. 282 (N.D. Ill. 1983) (Appendix B). The second opinion, granting NBC's motion for summary judgment on the remaining claim of willful violation of ADEA, is not officially reported. It is reprinted in Appendix C.

JURISDICTION

The judgment of the Court of Appeals, dated September 26, 1984 and entered on that date, is reprinted in Appendix D. Petitioner's application for rehearing with suggestion that rehearing be *in banc* was denied on October 29, 1984 (Appendix E). On motion of petitioner, the Court of Appeals stayed its mandate pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1). Jurisdiction in the District Court was asserted pursuant to 29 U.S.C. § 626(b) and 28 U.S.C. §§ 1331 and 1343(a)(4).

STATUTORY PROVISION INVOLVED

The Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. §§ 621-634, provides in relevant part:

§ 623. *Prohibition of age discrimination*

(a) It shall be unlawful for an employer—

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age; . . . .

§ 631. *Age Limits*

(a) *Individuals at least 40 but less than 70 years of age*

The prohibitions in this chapter shall be limited to individuals who are at least 40 years of age but less than 70 years of age.

STATEMENT OF THE CASE

1. NBC's Hiring Decisions[1]

Respondents Frank Herman and Frank Mullaney were employed as film editors in the News Department of NBC's Chicago station, WMAQ-TV. As videotape replaced film in the news gathering process during the 1970's, NBC gradually phased out its Film Department in favor of a new Electronic Journalism ("E/J") Department, with employees of the Film Department applying for new E/J positions as they were created. (App. 2a, 12a.)

On March 14, 1978, WMAQ-TV posted a written announcement for six remaining E/J positions — three E/J editing positions and three E/J minicam positions. (App. 20a-21a.) Respondents, who were both experienced film editors with NBC, submitted applications for the new editing positions. (App. 2a, 12a.) At the time of their applications Herman and Mullaney were ages 58 and 53 respectively. (App. 22a.)

Willis O. Marshall, WMAQ-TV's Director of Technical Operations and Engineering, was solely responsible for the hiring of permanent E/J employees in the spring of 1978. (App. 31a.) He reviewed the applications and consulted with William B. Carter, Supervisor of E/J Operations, concerning the applicants. As former manager of WMAQ-TV's News Technical Operations, Mr. Carter supervised news film employees, including respondents, who had applied for the E/J positions. (App. 31a.)

Before making his selections, Mr. Marshall asked Mr. Carter to rank separately (1) the Film Department's editors and assistant editors who had applied for E/J editing positions,

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[1] This description of NBC's hiring decisions is taken largely from affidavits submitted by the two NBC officials who reviewed the qualifications of applicants for the E/J editing positions. *See* Appendix F and Appendix G. This testimony, as the District Court found, was uncontradicted by respondents. (App. 23a-24a, 26a.)

and (2) the film crew members who had applied for E/J minicam positions. (App. 31a, 33a.) Mr. Carter designated his eight top choices for E/J editing positions. Based on his experience with them in the Film Department, Mr. Carter ranked Alan Stecker, John Martin and Dwight Samuelson as the "three best applicants" for the three E/J editing positions. (App. 31a, 33a.) Mr. Carter did not rank either Mr. Herman or Mr. Mullaney for the E/J editing positions, because he believed that eight other film editors or assistant editors were "better qualified" than either of respondents for the three E/J editing positions. (App. 34a.) Mr. Carter did not consider the ages of any of the employees in making his rankings. (App. 33a.)

Mr. Marshall "relied to a large extent" upon Mr. Carter's recommendations for the E/J editing positions. He selected Messrs. Stecker, Martin and Samuelson for the three positions because, based upon his evaluation of them and Mr. Carter's recommendations, he believed they were the "three best applicants for the E/J editing positions." (App. 31a, 32a.)

Mr. Stecker was a "highly desirable applicant" because, among other reasons, his dual experience as an editor and cameraman gave him a variety of skills that would increase WMAQ-TV's flexibility in its use of employees in more than one role on news stories. (App. 32a.)

Mr. Martin was selected because Mr. Marshall considered him to be the best editor at WMAQ-TV. Indeed, Mr. Martin had won several Emmy Awards for outstanding achievement in editing. (App. 32a.)

Mr. Samuelson was selected because he was a good editor and the fastest editor at WMAQ-TV. Mr. Marshall testified, without contradiction, that "[h]is ability to edit quickly was an important qualification for an editor in a news department, where there frequently is a need for someone who can take raw videotape and quickly edit it into a coherent news story under the constant pressure of short deadlines." (App. 32a.)

Mr. Marshall did not consider the ages of any of the applicants, including respondents, in making his selections.

(App. 32a.)[2] After the three E/J editing positions were filled, Messrs. Herman and Mullaney were notified that they would be discharged because of the change to videotape news gathering. (App. 12a.)

2. The District Court's Decisions

The United States District Court for the Northern District of Illinois (Hart, J.) issued two opinions. In the first (Appendix B), the District Court granted NBC's motion for partial summary judgment on respondents' charge of nonwillful age discrimination. The Court of Appeals affirmed. (App. 2a, 3a.) Petitioner does not seek review of this aspect of the Court of Appeals' decision.

In its second opinion (Appendix C), the District Court granted NBC's motion for summary judgment on respondents' remaining claim of willful age discrimination. Because the District Court found that respondents had failed to establish even that NBC had violated ADEA in a nonwillful way, the court found it unnecessary to ascertain the exact scope of the showing necessary to establish a willful violation of ADEA.[3] (App. 28a.)

In a carefully reasoned opinion, the District Court analyzed the evidence before it under the standards enunciated by

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[2] None of the three persons selected as E/J editors was forty years old or older. Two of the three individuals selected as minicam operators were in their forties. (App. 21a.)

[3] Neither the statute nor its legislative history defines "willful" age discrimination, a finding of which extends the statute of limitations from two years to three years, 29 U.S.C. § 626(e)(1), and entitles a plaintiff to liquidated damages, 29 U.S.C. § 626(b). This Court has not yet addressed the standard required for establishing a claim of willful age discrimination, and the Circuits are divided. However, "[t]he showing must clearly be greater than that necessary for the initial finding of ADEA liability." Syvock v. Milwaukee Boiler Manufacturing Company Inc., 665 F.2d 149, 156 n. 10 (7th Cir. 1981).

this Court in *Texas Department of Community Affairs* v. *Burdine*, 450 U.S. 248 (1981). Judge Hart found that both respondents were "minimally qualified" to fill the E/J positions. (App. 23a.) However, he noted that respondents had offered no evidence to rebut NBC's uncontradicted testimony that the three editors selected were superior to Herman and Mullaney. (App. 23a, 24a.) Respondents' "single, conclusory statement of superior qualifications fails to establish a prima facie case." (App. 25a.)

Even if respondents had established a prima facie case, the District Court found that NBC had stated a legitimate, nondiscriminatory reason for rejecting respondents and for selecting three others in their stead: "the others were more qualified." (App. 25a.) Accordingly, respondents could have proved an ADEA violation only by showing that NBC's stated reason for failing to hire them was pretextual, a cover-up for age discrimination. *Golomb* v. *Prudential Insurance Co.*, 688 F.2d 547, 551 (7th Cir. 1982).

Respondents, however, offered "*no proof* which casts doubt on the veracity of NBC's reasons for making its hiring decisions." (App. 27a.) (Emphasis added.) The District Court found that respondents' "assertion that 'age must have been the determining factor because they can think of no other reason for their rejections' does not create a material issue of fact in the face of NBC's nondiscriminatory reason for its hiring decisions." (App. 27a.) Similarly, the fact that Marshall may have known from a list within his control the relative ages of the applicants for the E/J positions could not defeat NBC's motion for summary judgment. (App. 27a.) Finally, the District Court addressed a two-paragraph affidavit from an applicant for a position in another division of NBC in 1974 concerning an alleged discriminatory remark made by an NBC official who was removed from his position in 1976, two years before respondents applied for the positions here. Judge Hart concluded that the affidavit was "worthless . . . . The facts asserted

in the affidavit, the only affidavit other than statements of the plaintiffs, do not present a triable controversy." (App. 27a-28a.)

3. The Court of Appeals' Decision

The Court of Appeals for the Seventh Circuit (Circuit Judges Pell and Eschbach and Senior District Judge Wyatt) affirmed the District Court's dismissal of the claim of nonwillful discrimination but reversed on the claim of willful discrimination. (Appendix A.)[4] The court ruled that respondents could establish a prima facie case at trial (App. 6a); it then turned to what it acknowledged was the "real" issue — "whether age was a determining factor in NBC's March 1978 decisions." (App. 7a.)

Because the court's decision on this point is inextricably bound up with petitioner's argument, the remainder of the Court of Appeals' analysis will be discussed in the two sections of the Argument which follow.

ARGUMENT

1. The New Standard Adopted by the Court of Appeals Is Contrary to This Court's Decision in *Burdine* and Would Permit Improper Judicial Second-Guessing of an Employer's Business Judgments.

Once a plaintiff has established a prima facie case, the employer "bears only the burden of explaining clearly the nondiscriminatory reasons for its actions." *Texas Department of Community Affairs* v. *Burdine*, 450 U.S. 248, 260 (1981).

NBC met this burden here by submitting undisputed affidavits demonstrating that the three "best applicants" were selected for the E/J editing positions and that age was not a factor in the decisions. The Court of Appeals, however, characterized NBC's qualitative hiring decisions as subjective,

[4] The court also stated that NBC's hiring decisions before March 1978 had not been eliminated from the case. (App. 4a, 5a.)

stating that "matters of preference that are not quantifiable were involved in the hiring process." (App. 7a.) The court then imposed an unprecedented standard on employers: to show "that the applicants' relative qualifications were such that no employer would have considered age." (App. 8a.)

The *only* support offered by the Court of Appeals for this unique new standard is a footnote reference to *Loeb* v. *Textron, Inc.*, 600 F.2d 1003, 1013 n.9 (1st Cir. 1979), a decision that predates by two years this Court's decision in *Burdine*. The footnote, which deals with the probative value of the age of complainant's replacement, appears irrelevant to the new standard promulgated by the Court of Appeals.[5]

The Court of Appeals' standard conflicts directly with *Texas Department of Community Affairs* v. *Burdine*, 450 U.S. 248 (1981). In *Burdine*, the Court of Appeals for the Fifth Circuit required the defendant to "prove that those he hired . . .

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[5] Footnote 9 in *Loeb* is appended to a sentence reading: "The prima facie case described in *McDonnell Douglas* did not include proof that some person outside the protected class was hired in complainant's place." The footnote itself reads as follows:

> This is not to say that evidence of the race or age of complainant's replacement may not sometimes be probative of discrimination. In an age case, the probative value of evidence as to the age of complainant's replacement obviously will depend on complainant's own age and the age difference. Replacement of a 60 year old by a 35 year old or even a 45 year old within the protected class would be more suggestive of discrimination than replacement of a 45 year old by a 42 year old within the protected class or by a 39 year old outside it. Replacement by someone older would suggest no age discrimination but would not disprove it conclusively. The older replacement could have been hired, for example, to ward off a threatened discrimination suit. *Cf. Furnco*, 438 U.S. at 579, 98 S.Ct. 2943 (balanced workforce does not preclude finding of specific act of discrimination); *Rhode Island Minority Caucus, Inc.* v. *Baronian*, 590 F.2d 372, 375-76 (1st Cir. 1979) (balanced group of voter registrars does not preclude finding of specific act of discrimination).

were somehow better qualified than was plaintiff: in other words, comparative evidence is needed." 608 F.2d at 567, quoted in *Burdine*, 450 U.S. at 256. This Court unanimously held that the Court of Appeals there had "required much more" of the employer than was permissible: "[I]t placed on the defendant the burden of persuading the court that it had convincing, objective reasons for preferring the chosen applicant above the plaintiff." 450 U.S. at 257.

So, too, here. The Court of Appeals overruled NBC's qualitative business judgment in selecting its three best applicants for the E/J editing positions. The court in effect substituted its judgment for that of Mr. Marshall: "Marshall further declared that Samuelson 'was the fastest editor at WMAQ-TV,' but speed does not necessarily translate into quality, and there was no showing that a fast film editor can become a fast videotape editor." (App. 8a.) The Court of Appeals also failed to credit the recommendations of Mr. Carter, on which Mr. Marshall relied. (App. 31a.) Such judicial "second-guessing" is precisely what this Court rejected in *Burdine*—"requiring the defendant to prove by objective evidence that the person hired or promoted was more qualified than the plaintiff." *Id.* at 258.

The Court of Appeals' rejection of NBC's *unrebutted* explanation of its hiring decisions[6] transforms the judiciary into an overseer of all employment decisions involving such subjective factors as the relative strengths and weaknesses of staff members — in clear conflict with *Burdine* and prior decisions of the Courts of Appeals. "[D]isappointed candidates cannot expect a federal judge to intervene simply in the hope that he or she will evaluate the factors differently." *Parker* v. *Federal National Mortgage Association*, 741 F.2d 975, 981 (7th Cir. 1984). *Accord Mason* v. *Continental Illinois National Bank*, 704 F.2d 361, 364 (7th Cir. 1983); *Cuthbertson* v. *Biggers Brothers, Inc.*, 702 F.2d 454, 465 (4th Cir. 1983); *Kephart* v.

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[6] *See* p. 3, n. 1, *supra*.

Institute of Gas Technology, 630 F.2d 1217, 1223 (7th Cir. 1980), *cert. denied*, 450 U.S. 959 (1981) (ADEA "not intended as a vehicle for judicial review of business decisions").

The new standard articulated by the Court of Appeals here — that an employer must show that "the applicants' relative qualifications were such that *no* employer would have considered age" (App. 8a, emphasis added) — goes even further than the standard struck down in *Burdine*. The Court of Appeals' standard places an unprecedented and unwarranted burden on an employer defendant. It provides to every disappointed job applicant the hope that a federal judge or jury will "reverse" the employer's judgment regarding his or her relative job qualifications. There is simply no basis for such an intrusive supervisory role for courts under ADEA or this Court's decisions. *See Burdine, supra; Board of Trustees of Keene State College* v. *Sweeney*, 439 U.S. 24 (1978).

2. On Defendant's Motion for Summary Judgment, Plaintiffs Are Entitled Only to Reasonable Inferences from Evidentiary Materials to Establish Pretext.

After NBC met its burden of articulating a nondiscriminatory reason for its hiring decisions, respondents were obligated to demonstrate that NBC's stated reason was merely a pretext or cover-up for age discrimination. *Burdine, supra*, 450 U.S. at 256; *Golomb* v. *Prudential Insurance Company of America*, 688 F.2d 547, 551 (7th Cir. 1982). To prove pretext, respondents would have had to show that their age was a *determining* factor in NBC's decision not to hire them and that but for their age they would have been hired. *Golomb*, 688 F.2d at 551; *Loeb* v. *Textron, Inc.*, 600 F.2d 1003, 1019 (1st Cir. 1979).

On defendant's motion for summary judgment, plaintiffs must demonstrate that there is a genuine issue of material fact by proffering specific facts going to the issue of pretext. Fed. R. Civ. P. 56(e). "The very mission of the summary judgment procedure is to pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial." Notes of Advisory Committee on Rules, Fed. R. Civ. P. 56(e), 1963 Amendment. Summary judgment for the defendant is appropriate in age discrimination cases when the non-moving party

raises no genuine issue of material fact to rebut the employer's nondiscriminatory reason for his hiring decision. *See Locke* v. *Commercial Union Insurance Co.*, 676 F.2d 205, 206 (6th Cir. 1982); *Simmons* v. *McGuffey Nursing Home, Inc.*, 619 F.2d 369, 371 (5th Cir. 1980); *Mason* v. *Continental Illinois National Bank*, 704 F.2d 361, 367 (7th Cir. 1983).

In assessing whether the non-moving party has raised any genuine issue of material fact, the District Court is "not required to evaluate every *conceivable* inference which can be drawn from evidentiary matter, but only reasonable ones." *Parker* v. *Federal National Mortgage Association*, 741 F.2d 975, 980 (7th Cir. 1984) (emphasis in original). "Although any inferences to be drawn from the underlying facts must be viewed in the light most favorable to the nonmoving party, only reasonable inferences will be considered." *Hermes* v. *Hein*, 742 F.2d 350, 353 (7th Cir. 1984).

The Court of Appeals failed to apply these standards here. It identified no "disputed material facts." Instead, in finding that three bits of "evidence" were sufficient to support a jury verdict of willful age discrimination (App. 7a-10a), the court drew patently unreasonable inferences from the evidentiary matter before it.

The first bit of "evidence" was a 1976 NBC memorandum that included, *inter alia*, the dates of birth of news film employees (including respondents). The NBC official who made the hiring decisions, Mr. Marshall, testified that he relied on the personal rankings of the employees by their supervisor, Mr. Carter, who made those rankings directly on a copy of the memorandum. (App. 31a, 9a.) Marshall further testified that he did not consider the ages of any of the applicants in making his selections. (App. 32a.)

The District Court considered and rejected the proposition that a genuine issue of material fact was presented because Marshall had had access to information indicating that respondents were older than the three individuals selected for the

positions. (App. 27a.) In light of NBC's *uncontradicted* proof that the three individuals selected were better qualified than respondents (App. 26a), evidence that the decision-maker was aware of the ages of various applicants cannot create a reasonable inference of discriminatory intent. To hold otherwise would "seemingly mandate a 'full dress trial' in virtually all cases." *Roane* v. *GTE Automatic Electric, Inc.* No. 80 C 3551 (N.D. Ill. 1982), at 7-8 (quoted in App. 27a).

The second piece of "evidence" isolated by the Court of Appeals was a two-paragraph affidavit from a rejected applicant for a position in another division of NBC in 1974 asserting that a discriminatory remark was made by an NBC official who was removed from his position in 1976. The Court of Appeals failed to explain how the actions of a different NBC official four years previous to the March 1978 hiring decisions created a reasonable inference that "age was a determining factor" in NBC's failure to hire respondents. Judge Hart was surely correct when he termed the affidavit "worthless." (App. 27a.)

Third, the Court of Appeals found "statistical support" for respondents' case despite the fact that respondents failed to produce any testimony, affidavit or report from any statistical expert establishing or even suggesting that age played a role in NBC's hiring decisions. (App. 9a.) Respondents introduced no evidence whatsoever regarding methodology, sample size or composition, margin of error or level of confidence, or statistical reliability and validity. Under these circumstances, the numbers cited by the Court of Appeals (App. 10a) are just raw numbers, not statistical evidence. As such, they cannot give rise to a reasonable inference of age discrimination.[7] *See, e.g., Parker* v. *Federal National Mortgage Association,* 741 F.2d 975, 980-81 (7th Cir. 1984).

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[7] In Wilkins v. University of Houston, 654 F.2d 388, 410 (5th Cir. 1981), *vacated and remanded on other grounds,* 459 U.S. 809 (1982), the court added a "rueful and cautionary" note to advocates who seek to employ statistical analysis:

(Footnote continued on following page)

The analysis employed by the Court of Appeals here goes well beyond the instant case. From a broader perspective, such analysis severely erodes the ability of already overburdened District Courts to use summary judgment as an efficient and economical means of disposing of litigation at a relatively early stage, where the non-moving party has been unable to adduce a genuine issue of material fact.

The Courts of Appeals have recognized that summary judgment is an effective mechanism in cases of alleged discrimination under ADEA. *See, e.g., Parker* v. *Federal National Mortgage Association,* 741 F.2d 975, 979-80 (7th Cir. 1984); *Mason* v. *Continental Illinois National Bank,* 704 F.2d 361, 367 (7th Cir. 1983); *Ackerman* v. *Diamond Shamrock Corp.,* 670 F.2d 66, 70 (6th Cir. 1982); *Locke* v. *Commercial Union Insurance Co.,* 676 F.2d 205, 206 (6th Cir. 1982); *Simmons* v. *McGuffey Nursing Home, Inc.,* 619 F.2d 369, 371 (5th Cir. 1980). "Summary judgment is a procedure which advances the salutary objective of avoiding useless, expensive and time-consuming trials where there is actually no genuine, factual issue remaining to be tried." *Anderson* v. *Viking Pump Division, Houdaille Industries, Inc.,* 545 F.2d 1127, 1129 (8th Cir. 1976).

For summary judgment to remain an effective mechanism in such cases, respondents must be held to a "reasonable inference" standard to establish pretext. If allowed to stand, the Court of Appeals' decision will mandate a trial in every case in which "matters of preference that are not quantifiable were involved in the selection process." (App. 7a.)

3. Summary Disposition May Be Warranted.

Because the Court of Appeals imposed a new standard for employers directly in conflict with this Court's decision in *Texas Department of Community Affairs* v. *Burdine,* 450 U.S. 248

(Footnote continued from previous page)

> The bar is reminded that sound statistical analysis is a task both complex and arduous . . . . [T]he day is long past . . . when we proceed with any confidence toward broad conclusions from crude and incomplete statistics. That everyone who has eaten bread has died may tell us something about bread, but not very much.

(1981), *supra* p. 7, petitioner respectfully suggests that the Court may wish to consider summarily reversing the decision below or vacating the judgment and remanding the case for further proceedings. Rule 23.1; *see also Board of Trustees of Keene State College* v. *Sweeney*, 439 U.S. 24 (1978).

CONCLUSION

For the foregoing reasons, if the Court should decline to order summary disposition on the merits, respondent respectfully requests the Court to grant a writ of certiorari to review the decision below.

Respectfully submitted,

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APPENDICES

APPENDIX A

In the

United States Court of Appeals

For the Seventh Circuit

No. 83-2834

FRANK HERMAN and FRANK MULLANEY,

Plaintiffs-Appellants,

v.

NATIONAL BROADCASTING COMPANY, INC.,

Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 80 C 2207—William T. Hart, *Judge.*

ARGUED MAY 24, 1984—DECIDED SEPTEMBER 26, 1984

Before PELL and ESCHBACH, *Circuit Judges*, and WYATT, *Senior District Judge.**

ESCHBACH, *Circuit Judge.* The issue presented is whether the district court properly granted summary judgment in favor of the National Broadcasting Company ("NBC") and against the plaintiffs alleging nonwillful and willful violations of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 621-634. We agree with the district court that the nonwillful claims are barred by the

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* The Honorable Inzer B. Wyatt, Senior District Judge for the Southern District of New York, sitting by designation.

statute of limitations, but we reverse the award of summary judgment and we remand the case for further proceedings on the willful claims.

I.

The plaintiffs, Frank Herman and Frank Mullaney, were employed as film editors in the news department of NBC's Chicago station, WMAQ-TV. In the mid 1970's videotape replaced film as the means of capturing images. Accordingly, the film department was gradually eliminated as new electronic journalism ("E/J") positions were created. Employees who worked with film were not automatically transferred into E/J positions but, rather, had to apply for the jobs as they were created. The plaintiffs did apply for openings posted by NBC in 1976, 1977, and 1978. Herman and Mullaney, however, were not selected for those positions and, as the film operations were drawing to a close, were dismissed from their employment. Mullaney was 53 years old when he received notice of his termination on March 24, 1978; Herman was 58 when his termination notice arrived on April 28, 1978.

Believing that age played a role in NBC's decisions, the plaintiffs filed age-discrimination charges with the Department of Labor in May of 1978. Pursuant to a transfer of authority, *see* Reorganization Plan No. 1 of 1978, 92 Stat. 3781, the Equal Employment Opportunity Commission investigated the matter and as of September 21, 1979, believed the charges to have merit. A civil action was never brought by the Commission, however, and on May 2, 1980, the plaintiffs filed the complaint in this case.

II.

A suit alleging a nonwillful violation of the ADEA must be brought "within two years after the cause of action has accrued." 29 U.S.C. § 255(a) (incorporated by 29 U.S.C. § 626(e)(1)). Because both plaintiffs received termination notices by April 1978, *see Delaware State College*

v. Ricks, 449 U.S. 250, 258 (1980), but did not bring suit until May 1980, NBC moved for summary judgment on the plaintiffs' nonwillful claims (Count I). Responding to the motion, the plaintiffs asserted that NBC's actions constitute a "continuing violation"—i.e., illegal discrimination occurs each time NBC hires a person other than the plaintiffs in an E/J position. The district court, holding that the "continuing violation doctrine is meaningless under the facts of this case," 569 F. Supp. 282, 286, granted NBC's motion.

We fully agree with the district court's observation that the plaintiffs' reaction to the motion for partial summary judgment was, in fact, unresponsive. A predicate for a civil suit under the ADEA is a charge (previously an intent-to-sue notice) filed with the appropriate administrative agency. 29 U.S.C. § 626(d). Liberally construing the plaintiffs' charges in this case, *see Dickerson v. DeLuxe Check Printers, Inc.*, 703 F.2d 276, 283 (8th Cir. 1983), we find allegations regarding the terminations and events prior to the dismissals, but no mention is made of subsequent acts by NBC. In short, no post-termination decision or act of NBC was made the basis of an administrative charge. The most recent decision properly before the court, therefore, is NBC's decision to terminate Herman, which was made known to him in April of 1978. *See Lawson v. Burlington Industries, Inc.*, 683 F.2d 862, 864 (4th Cir.), *cert. denied*, 103 S. Ct. 257 (1982) ("Each alleged discriminatory recall constitutes a separate and complete act by the defendant, which triggers a new 180 day period" for filing an administrative charge.); *Scaramuzzo v. Glenmore Distilleries*, 501 F. Supp. 727, 729 (N.D. Ill. 1980). This case was commenced more than two years after Herman and Mullaney received their dismissal notices and, absent any suggestion that the limitations period should be equitably modified, the district court correctly granted summary judgment in favor of NBC on the plaintiffs' nonwillful claims.

III.

Having eliminated nonwillful allegations from the case, NBC made a motion for summary judgment on the remaining claims of willful discrimination.[1] To prove willfulness, a "plaintiff must show that the defendant's actions were knowing and voluntary and that he knew or reasonably should have known that those actions violated the ADEA." *Syvock v. Milwaukee Boiler Manufacturing Co.*, 665 F.2d 149, 156 (7th Cir. 1981). NBC, which posted ADEA notices and employed an ADEA compliance officer, was in no position to plead ignorance of the law. *See also id.* at 156 n.10. Accordingly, NBC attacked the plaintiffs' central allegation—that age played a role in the plaintiffs' separation from NBC.[2] To this end, NBC obtained from Willis Marshall, Director of Technical Operations and Engineering for WMAQ-TV, an affidavit stating that when he selected three E/J editors pursuant to a job posting in March 1978, he chose "the three best applicants" and "did not consider the ages of any of the applicants."

We believe that NBC's showing was insufficient to warrant summary judgment. It is the movant's burden to establish the absence of a genuine issue of material fact; if this burden is not met, the opposing party need not respond with evidentiary material. *Adickes v. S.H. Kress and Company*, 398 U.S. 144, 160 (1970); *Egger v. Phillips*, 710 F.2d 292, 296 (7th Cir.) (en banc), *cert. denied*, 104 S. Ct. 284 (1983). NBC only submitted evidence indicating that age played no role in the selection of E/J editors in March 1978. However, the complaint, as amplified by answers to interrogatories, encompassed more than the 1978 selections. The plaintiffs were passed over when E/J positions were filled in 1976 and 1977, but NBC submitted no evidence to refute the allegation that age played a role in these hiring decisions.

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[1] The statute of limitations for willful claims is three years. 29 U.S.C. § 255(a) (incorporated by 29 U.S.C. § 626(e)(1)).

[2] In essence, therefore, NBC's position was that the plaintiffs could not prove a nonwillful violation.

Instead of attacking all of the plaintiffs' allegations on the merits, NBC mischaracterized the district court's order granting the initial motion for partial summary judgment, *see supra* at 3. The district court in that order removed the plaintiffs' nonwillful claims from the case; the court did not, contrary to NBC's assertion, limit the plaintiffs' allegations of willful violations to the employment choices made in March 1978. 569 F. Supp. at 288. NBC may believe that the March 1978 decisions are the only ones before the court because administrative charges were not filed within 180 days of the prior decisions, *see* 29 U.S.C. § 626(d)(1). But this unilateral understanding of the law as it applies to this case is not the only or inevitable view. The continuing violation doctrine, which has no place with respect to acts never made the basis of a charge, *see supra* at 3, does work "to toll the 180 day period for *filing with the EEOC.*" *Herman v. National Broadcasting Company*, 569 F. Supp. at 286 (emphasis in original); *see also Roberts v. North American Rockwell Corp.*, 650 F.2d 823, 826 (6th Cir. 1981); *Milton v. Weinberger*, 645 F.2d 1070, 1075 (D.C. Cir. 1981). Similarly, the 180-day period is subject to equitable modifications, *see Posey v. Skyline Corp.*, 702 F.2d 102, 104 (7th Cir.), *cert. denied*, 104 S. Ct. 392 (1983), and may not even commence running until "the employee knows or should know that an unlawful practice has been committed." *Aronsen v. Crown Zellerbach*, 662 F.2d 584, 593 (9th Cir. 1981), *cert. denied*, 103 S. Ct. 1183 (1983). We raise these points of law, not to discuss their viability or application to the facts of this case, but to demonstrate that NBC's hiring decisions before March 1978 have not been eliminated from the case.

Although the award of summary judgment cannot be affirmed, it could still be the case that the March 1978 decisions should be removed from the list of possible ADEA violations. *See generally* Fed. R. Civ. P. 56(d) (case not fully adjudicated on summary judgment motion). Addressing this point in its brief to this court (as well as in its memorandum to the district court), NBC includes

the following "quote" purportedly from *Holder v. Old Ben Coal Company*, 618 F.2d 1198, 1202 (7th Cir. 1980):

> A desire to hire the more experienced or better qualified applicant is a non-discriminatory, legitimate and common reason on which to base a hiring decision. Thus . . . plaintiff must foreclose this possible explanation for a hiring decision before [a] prima facie case is established.

Appellee Brief at 15. Relying on this language, particularly the latter sentence, NBC asserts that "plaintiffs cannot meet the threshold requirements of a prima facie case of age discrimination." *Id.* at 17. NBC has, however, misquoted *Holder*. The sentence "Thus . . . plaintiff must foreclose this possible explanation for a hiring decision before a prima facie case is established" was deleted from the *Holder* opinion on April 17, 1980, when the petition for rehearing was denied. Thus four years after the opinion was modified and correctly published in the *Federal Reporter*, NBC continues to cite and rely on a deleted sentence. We, of course, do not suggest that NBC's attorneys have intentionally misrepresented *Holder*, but lawyerlike steps to ensure accuracy plainly were not taken.

A review of the submitted evidentiary materials reveals, in fact, that the plaintiffs can establish a prima facie case at trial. The plaintiffs were within the protected age group (Herman was 58 and Mullaney was 53) when their applications for E/J positions were rejected in March 1978. *See Monroe v. Equal Employment Opportunity Commission*, Nos. 83-1245 et al., slip op. at 13 (7th Cir. May 30, 1984); *Blackwell v. Sun Electric Corp.*, 696 F.2d 1176, 1180 (6th Cir. 1983). NBC, moreover, concedes that the plaintiffs "had minimal qualifications for the E/J editing positions"; and William Carter, NBC's supervisor of film department employees, testified in his deposition that he hoped to find E/J positions for "as many [film] people as possible." In short, Herman and Mullaney were the type of applicants that NBC sought, and they possessed

"qualifications similar" to those actually selected. *Loeb v. Textron, Inc.*, 600 F.2d 1003, 1013 (1st Cir. 1979); *Holder v. Old Ben Coal Company*, 618 F.2d 1198, 1202 (7th Cir. 1980) ("plaintiff must show that the employer was seeking applicants of qualifications comparable to plaintiff's").

The concept of a prima facie case, however, should not distract us from the real issue—whether age was a determining factor in NBC's March 1978 decisions. *See Monroe v. Equal Employment Opportunity Commission*, *supra*, at 12; *see also Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 256 (1981) (plaintiff, at all times, retains the burden of persuasion). A prima facie case is not a complete shield against summary judgment. *See Steckl v. Motorola, Inc.*, 703 F.2d 392, 393 (9th Cir. 1983). NBC produced a legitimate, nondiscriminatory reason for the rejections by submitting affidavits stating that qualifications, not age, determined the 1978 selections. *See Burdine*, *supra*, at 254. Consequently, the issue became (and still is) whether the evidence before the district court could support a jury verdict finding age discrimination. *See Mason v. Continental Illinois National Bank*, 704 F.2d 361, 366 (7th Cir. 1983); *accord Douglas v. Anderson*, 656 F.2d 528, 535 n.7 (9th Cir. 1981). We now turn to that evidence.

Willis Marshall, the NBC executive who made the hiring decision, stated in his affidavit that he selected the "three best applicants for the three E/J editing positions." Similarly, William Carter, the supervisor who advised Marshall on the matter, stated that he believed those chosen "were the three best applicants." Yet in his deposition, Marshall acknowledged that this type of hiring decision involves "subjective evaluation[s]." We understand this phrase to mean that reasonable employers could disagree about who were the best applicants; and, in any event, matters of preference that are not quantifiable were involved in the selection process. It is not wrong, and certainly not per se illegal, for an employer to exercise his business judgment as he sees fit. Yet a descrip-

tion such as "best" is not compelling evidence that the applicants' relative qualifications were such that no employer would have considered age. *See generally Loeb v. Textron, Inc.*, 600 F.2d 1003, 1013 n.9 (1st Cir. 1979).

NBC's defense is not particularly strengthened by examining the describable and objective qualifications of the plaintiffs and those hired—Messrs. Stecker, Martin, and Samuelson. The evidence indicates that Herman and Mullaney were the more experienced film editors (19 years and 15 years, respectively).[3] Herman also had videotape experience, something that none of those hired claimed on their applications. Marshall stated in his affidavit that he valued Stecker's experience as a cameraman, but Herman also had such a background. Marshall further declared that Samuelson "was the fastest editor at WMAQ-TV," but speed does not necessarily translate into quality, and there was no showing that a fast film editor can become a fast videotape editor. Finally, NBC submitted no evidence to denigrate the plaintiffs' talents.

We do not suggest that Herman and Mullaney were the most qualified applicants. We describe the showings on this question only to point out that NBC's position was not overwhelming. Nevertheless, if the plaintiffs had no proof beyond a bare-bones prima facie case, we might hold that the March 1978 allegations should be removed from the case. But the plaintiffs' evidence did not stop at the prima facie line.

In 1976, as the change from film to videotape was in its early stages, William Carter met with Frank Jordan, described by Carter as the person "responsible for personnel during the changeover." Jordan, who was based

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[3] In its memorandum below, NBC stated that Martin "had 16 years of editing experience with WMAQ-TV." But the documents produced by NBC indicate that, although Martin had been with NBC for 16 years, he had 12 years of editing experience. This inconsistency is not significant, however, because one of those hired, Stecker, had only 7 years of editing experience.

in Washington, D.C., met with Carter in Chicago, where the two discussed moving people into E/J positions. Jordan asked Carter to prepare a memorandum listing the names of people in film positions, their company seniority, their proposed utilization, and *their dates of birth.* Carter collected the information, prepared the memorandum for Jordan, and gave a copy to Willis Marshall. Carter later added his personal rankings to the memorandum, which was then used by Marshall in making his March 1978 decisions. If age was not a factor in the hiring decisions, why did the memorandum requested by a top NBC executive, and used by those immediately responsible for hiring, contain such information? There may, of course, be a nondiscriminatory explanation, but that possibility does not detract from the evidentiary value of the document.

Moreover, the plaintiffs submitted an affidavit of Richard Ortner, which states that in a job interview with WMAQ-TV's General Manager in 1974, he was told, "Being 50 years old is an absolute no, no for being hired on staff." The General Manager, to be sure, left the Chicago station in 1976, but the transfer to videotape was already in progress. And, although NBC discounts the Ortner affidavit, past discriminatory acts of an employer are evidence of a "custom" or "policy" of discrimination. *See Morris v. Washington Metropolitan Area Transit Authority,* 702 F.2d 1037, 1045 (D.C. Cir. 1983).

Finally, the plaintiffs have statistical support for their case. The usefulness of statistical evidence depends on the circumstances of the case, *compare Reeves v. General Foods Corp.,* 682 F.2d 515, 525 (5th Cir. 1982), *with Kephart v. Institute of Gas Technology,* 630 F.2d 1217, 1224 (7th Cir. 1980), *cert. denied,* 450 U.S. 959 (1981), and we will not assess the force of the instant data.[4] We will

[4] The plaintiffs assert that an expert will testify that the statistics establish that age did play a role in NBC's hiring decisions. However, no affidavit to that effect was filed, *see* Fed. R. Civ. P. 56(e), and thus the district court properly ignored the assertion.

note that the 20 persons hired pursuant to the 1976, 1977, and 1978 job postings were all under 50 years old. To rebut the plaintiffs' view of the statistics, at oral argument NBC directed our attention to a document indicating that 16 film employees under 50 years old were not retained in the transition. That same document, however, shows that 33 persons *under* 50 were hired in new jobs, whereas all 11 employees *over* 50 were dismissed.

In conclusion, we disagree with the district court's statement that "plaintiffs . . . have offered no proof which casts doubt on the veracity of NBC's [proffered] reasons for making its hiring decisions." The district court may have believed that the plaintiffs needed direct evidence of discriminatory intent (such as an admission), but that plainly is not the law, *see United States Postal Service Board of Governors v. Aikens*, 103 S. Ct. 1478, 1481 n.3 (1983). As the Supreme Court declared in *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464, 472 (1962), "we cannot say on this record that 'it is quite clear what the truth is.' " Accordingly, we hold that the March 1978 allegations should not be removed from the case.

IV.

For the reasons expressed in this opinion, the district court's order removing the allegations of nonwillful violations of the ADEA, contained in Count I, is affirmed. We reverse, however, the award of summary judgment and the case is remanded for proceedings consistent with this opinion. Circuit Rule 18 shall not apply and costs on appeal are awarded to the plaintiffs.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

FRANK HERMAN, FRANK MULLANEY AND GEORGE LUSSON, PLAINTIFFS,

v.

NATIONAL BROADCASTING COMPANY, INC., DEFENDANT.

No. 80 C 2207.

United States District Court, N.D. Illinois, E.D.

May 31, 1983.

MEMORANDUM OPINION AND ORDER

WILLIAM T. HART, District Judge.

Plaintiffs[1] Frank Herman ("Herman"), age 60, and Frank Mullaney ("Mullaney"), age 57, bring this two count complaint against their former employer National Broadcasting Company, Inc. ("NBC") alleging that NBC's failure to consider them for new staff positions, failure to train them for temporary positions and other acts constitute both willful and nonwillful discrete and continuing violations of The Age Discrimination in Employment Act of 1967, as amended 29 U.S.C. §§ 621 *et seq.* ("ADEA"). Jurisdiction is asserted pursuant to 29 U.S.C. § 626(b), 28 U.S.C. § 1331[2] and § 1343(4).

Presently before the Court is NBC's motion for partial summary judgment in its favor on all claims of nonwillful

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[1] By stipulation an additional plaintiff George Lusson was dismissed on January 26, 1981.

[2] The Court assumes that the plaintiffs intended to allege jurisdiction under § 1331, so-called federal question jurisdiction, although the complaint purports to assert jurisdiction under 28 U.S.C. § 1337, which relates to commercial and antitrust regulations.

violations. For the reasons stated below, NBC's motion for partial summary judgment is granted.

FACTS

Herman was employed as a full-time film editor in the news department of NBC's WMAQ—TV from 1966 until June 30, 1978. Mullaney was employed as a full-time assistant film editor, also in NBC's WMAQ—TV news department, from 1972 until May 19, 1978. In the Spring of 1978, NBC completed a technological conversion of its news gathering process, changing from film to videotape. Incident to that changeover, a new videotape department was created, known as the "Electronic Journalism Department." On March 14, 1978, NBC solicited applications for six engineering positions in the new department. Both Herman and Mullaney applied. Their applications were rejected in writing on March 31, 1979, ostensibly because all new positions had been filled. Herman and Mullaney also were informed that their respective applications would be kept on file pending vacancies.

At about the same time as they were rejected for new staff positions, Herman and Mullaney were notified that due to the change to videotape news gathering they would be discharged. Herman's letter of termination was received on April 28, 1978 and announced that his last day of regular employment by NBC would be June 30, 1978. Mullaney's letter of termination was dated March 24, 1978 and indicated that his final employment date would be May 21, 1978. Both letters noted that the impending dismissals were not for any cause attributable to the plaintiffs.

On May 8, 1978 Herman filed an age discrimination charge with the Wage and Hour Division of the Department of Labor and Mullaney filed a similar charge on May 11, 1978.[3]

[3] Pursuant to a reorganization, the Equal Employment Opportunity Commission ("EEOC") assumed the handling of age discrimination charges. 1978 Reorg.Plan No. 1, Fed.Reg. 19807, 92 Stat. 3781.

Subsequent to their respective discharges, Herman and Mullaney were hired to perform temporary work at NBC. During the pendency of the EEOC investigation of their charges, Herman and Mullaney complained to EEOC investigators that NBC was continuing to discriminate against them due to their age by failing to train them for the temporary jobs and, despite an avowed hiring freeze, hiring younger persons than they for ultimate promotion to permanent positions. No formal complaints of post-termination violations were ever filed by the plaintiffs with the EEOC.

Herman and Mullaney filed this suit on May 2, 1980. They allege that NBC's failure to hire them for the newly created engineering jobs and certain post-termination conduct violated ADEA. Herman and Mullaney do not argue that NBC's decision to terminate them due to technological changes was improper.[4] But, they assert that it was only "at the time of their temination . . . that Plaintiffs were able to take an overview of what happened and saw that there was a distinct pattern of discrimination in hire against those 50 years of age and older."

NBC has moved for partial summary judgment on the plaintiffs' allegations of nonwillful age discrimination. Accord-

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[4] Nonetheless, all parties extensively discuss the law governing the filing period relative to discriminatory discharge. Under that law, the trigger point for filing is when the plaintiff is unequivocally notified of an impending termination and not the date on which the termination actually occurs. *Chardon* v. *Fernandez,* 454 U.S. 6, 102 S.Ct. 28, 70 L.Ed.2d 6 (1981); *Delaware State College* v. *Ricks,* 449 U.S. 250, 101 S.Ct. 498, 66 L.Ed.2d 431 (1980). As the claimed discriminatory act is not NBC's decision to terminate, *Chardon* and *Ricks* are irrelevant. However, even if discriminatory termination was claimed, this suit is still untimely. Herman and Mullaney were notified on April 28, 1978 and March 24, 1978 that they would be terminated on June 30, 1978 and May 19, 1978 respectively. If Herman and Mullaney had wanted to sue on those events, such suits were properly commenced within two years of the notice of discharge—on or before April 28, 1980 or March 24, 1980.

ing to NBC, a claim for nonwillful age discrimination must be filed within two years of the alleged violation. Since Herman and Mullaney were rejected for the new department on March 31, 1978, NBC argues that this suit is time barred as it was not filed on or before March 31, 1980. Plaintiffs do not dispute the two year limitations period for nonwillful violations of ADEA. Instead they counter the motion for partial summary judgment by characterizing NBC's conduct after their rejections as "continuing violations" of ADEA: each new incident with an independent filing period, unelapsed on May 2, 1980.

DISCUSSION

ADEA discrimination claims are governed by the following filing time requirement and statutes of limitation: (1) A claimant must file a discrimination charge with the Secretary of Labor within 180 days after the occurrence of the alleged unlawful act. 29 U.S.C. § 626(d)(1); (2) A lawsuit alleging a nonwillful violation of ADEA must be commenced within two years after the occurrence of the alleged violations. 29 U.S.C. § 626(e)(1), incorporating section 6 of the Portal-to-Portal Act of 1947, 29 U.S.C. § 255; and (3) A lawsuit alleging a willful violation of ADEA must be commenced within three years after the occurrence of the alleged willful violation. 29 U.S.C. § 626(e)(1), incorporating section 6 of the Portal-to-Portal Act of 1947, 29 U.S.C. § 255.

NBC concedes that the plaintiffs' allegations of willful discrimination are within the three year limitation period. Whether Herman and Mullaney's claims of nonwillful violations of ADEA are timely, however, is disputed. Resolution turns on isolating the actionable behaviors and pinpointing their occurrence dates. Here the complaint and pleadings allege two discrete violations or classes of violations: the rejections and the continuing violations. Dating the alleged rejection violations is not a problem. Assuming the rejections were discriminatory, the violations occurred on March 31, 1978,

the date the plaintiffs were notified of the unavailability of positions in the Electronic Journalism Department. Their respective ADEA charges were filed with the EEOC on May 8, 1978 and May 11, 1978—well within the 180 day filing period.[5]

The two year statutes of limitation for bringing an ADEA suit in federal court for nonwillful violations commences on the same date as the 180 day period for filing a charge with the EEOC, *i.e.*, the violation date. *See, e.g., Marshall v. Kimberly Clark, Inc.*, 625 F.2d 1300 (5th Cir.1980). Thus, a complaint charging discriminatory rejection was due in this Court no later than March 31, 1980. This suit, however, was filed on May 2, 1980.

Regardless, Herman and Mullaney claim that the statute of limitations for filing was tolled because NBC's alleged "continuing violation" occurred sometime after their late May and June 1978 terminations. Under their view, a suit for nonwillful ADEA violations filed on May 2, 1980 is timely. The plaintiffs argue that they told the EEOC about the continuing violations incident to the EEOC's investigation of NBC. The Court does not doubt that the plaintiffs told the EEOC their versions of NBC's post-termination actions and motives. Furthermore, the Court notes that the EEOC investigation of NBC continued at least through 1979. However, those facts are irrelevant to the issue here. Herman and Mullaney misunderstand the legal nature of a "continuing violation" and the effect such a finding has on the timing of ADEA litigation.

A "continuing violation" derives from an ongoing discriminatory policy which adversely affects persons within the

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[5] Although the exhibits do not indicate the specifics of the charges filed, the Court assumes that the rejections were the focus of the charges. Other allegedly unlawful behavior by NBC had not yet occurred. Nor had the plaintiffs yet formed a suspicion of what they term a pattern of age discrimination by NBC against its employees 50 years and older.

protection of ADEA or Title VII.[6] *See, e.g., Roberts v. North American Rockwell Corp.*, 650 F.2d 823 (6th Cir. 1980); 2 Larson, "Employment Discrimination" 9A § 48.54 (1980). Unlike a discrete violation, such as a discriminatory discharge, it is difficult to date a violation bottomed on a failure to hire or promote due to the employer's ongoing unlawful policy. For example, where there is proof that a plaintiff has made numerous inquiries of the status of a previously rejected application for hire or promotion, and he is again rejected or put off, the most recent rejection in the continuing series is the violation date. *Roberts v. North American Rockwell Corp., supra; Belt v. Johnson Motor Lines, Inc.*, 458 F.2d 443 (5th Cir.1972).

The effect of finding a "continuing violation" is to toll the 180 day period for *filing with the EEOC.* The last violation, rather than the first in a series, is the triggering event. So long as a plaintiff claims, when he or she eventually files with the EEOC, that there was within the preceding 180 days a present violation and not just the lingering effects of a past violation, the filing is timely. *United Air Lines, Inc. v. Evans*, 431 U.S. 553, 97 S.Ct. 1885, 52 L.Ed.2d 571 (1977); *Farris v. Board of Education*, 576 F.2d 765 (8th Cir.1979). Here the plaintiffs timely filed their charges of unlawful rejection with the EEOC. It is only later that they alleged other or an ongoing series of discriminatory acts. Since the 180 day filing period was met, however, no EEOC filing period for the unlawful rejections need be tolled. The continuing violation doctrine is meaningless under the facts of this case. *See Scaramuzzo v.*

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[6] Numerous cases hold that ADEA, like Title VII, is a remedial statute with comparable aims and the law developed in Title VII cases generally is applied to ADEA litigation. *See, e.g., Coke v. General Adjustment Bureau, Inc.*, 616 F.2d 785 (5th Cir. 1980); *Kephart v. Institute of Gas Technology*, 581 F.2d 1287 (7th Cir. 1978), *cert. denied*, 450 U.S. 959, 101 S.Ct. 1418, 67 L.Ed.2d 383 (1981).

Glenmore Distilleries Co., 501 F.Supp. 727, 729 n. 2 (N.D.Ill.1980).

When Herman and Mullaney filed with the EEOC in April 1978, they unequivocally announced that at least one violation, their rejections for new positions, preceded that filing within 180 days. Those charges of improper rejection were lost unless suit was instituted by March 31, 1980. Plaintiffs' argument that it was only after their respective terminations that they were able to discern a pattern of age discrimination is to no avail. They obviously were suspicious enough of NBC's motives against them before their terminations to file an age discrimination charge with the EEOC. Having properly filed with the EEOC in the first instance, they cannot now ignore the reason for that filing and its applicable limitations' period.

Had Herman and Mullaney timely sued on their charges of discriminatory rejection, they could have raised NBC's post-termination conduct as evidence of a discriminatory pattern of behavior which NBC allegedly practiced against its older employees or at least against Herman and Mullaney. This Circuit holds, albeit in a Title VII context, that a claim may encompass any acts of discrimination similar or reasonably related to the allegations made in the initial EEOC charge. *Jenkins v. Blue Cross Mutual Hospital Insurance, Inc.*, 538 F.2d 164, 167 (7th Cir.) (*en banc*), *cert. denied*, 429 U.S. 986, 97 S.Ct. 506, 50 L.Ed.2d 598 (1976). An administrative charge only triggers the EEOC investigation and its efforts at conciliation. *Id.* at 168. Any civil action subsequently filed "grows out of the administrative investigation rather than the employee's specific allegations." *McCray v. Standard Oil Co. (Indiana)*, 76 F.R.D. 490, 497 (N.D.Ill.1977). *See also Scaramuzzo v. Glenmore Distilleries Co., supra*, at 730.

No cases were located, however, which hold that the time for bringing suit on new or old claims is open-ended so long as the initial 180 filing period for the old claim is respected and the new claims are raised in the course of the EEOC investigation.

It is possible that an EEOC investigation of NBC could have continued until 1980 or beyond. Also possible is that during the investigation Herman and Mullaney would have remained in NBC's temporary and allegedly discriminatory employ. Under the plaintiffs' theory, if they told the EEOC about any of NBC's so-called continuing violations, they could have stalled suing for the allegedly discriminatory rejections and for the new claims until 1982 or beyond—even though the only EEOC charge was filed in 1978.

ADEA is to the contrary. A suit for nonwillful violations must be brought within two years of the unlawful act. The continuing violation doctrine does not alter that law. After the 180 filing period is met for the later rather than the earlier violation, the two year limitation period inalterably follows. Unless Herman and Mullaney separately filed EEOC charges within 180 days of any violations occurring after March 31, 1978, those claims as well as the discriminatory rejection claims are forfeited.

The Seventh Circuit's recent admonition that in an employment discrimination context all doubts on a jurisdictional point must be resolved in favor of plenary trial rather than dismissal at the pretrial stage is not controlling here. *See Pastrana v. Federal Mogul Corp.*, 683 F.2d 236, 242 (7th Cir.1982) (dismissal inappropriate where issue is whether plaintiff alleged national origin *and* physical handicap discrimination before the EEOC where EEOC intake officer checked only one box despite plaintiff's oral charge of both types of discrimination). Here, there is no question as to when the rejections occurred. The plaintiffs timely filed and described their allegations of rejection in April of 1978. They were not prevented from bringing other claims to the attention of the EEOC at that time: the alleged continuing violations were still in the future. Similarly the plaintiffs did not formally charge NBC with continuing violations in such a way as to fix a timeframe for commencing suit two years after those subsequent violations allegedly occurred.

Having failed to sue within two years of the rejections or bring separate charges of post-termination violations, this action is untimely as a matter of law. No genuine issues of material fact on those points remain for trial and partial summary judgment in NBC's favor is appropriate. Fed.R. Civ.P. 56.

The plaintiffs' fall back position is that NBC waived its right to raise the statute of limitations by allegedly failing to raise or preserve the defense by answer or otherwise. The plaintiffs are incorrect. First, NBC's answer denies that plaintiffs complied with all procedural prerequisites to bringing an ADEA action. Second, NBC's second affirmative defense is that the plaintiffs' complaint is deficient because it does not assert that the plaintiffs complied with various filing prerequisites under ADEA. Based on NBC's answer and affirmative defense, the Court finds that the plaintiffs were properly apprised of NBC's concerns for the jurisdictional basis of this suit. NBC was not required to specifically amend its affirmative defense once it discovered the dates critical to this suit. NBC properly filed this motion for partial summary judgment.

IT IS THEREFORE ORDERED that

1. Summary judgment is granted in favor of NBC and against Herman and Mullaney on Count I.

2. Summary judgment is granted in favor of NBC and against Herman and Mullaney on the allegations of nonwillful violations of ADEA made in Count II.

3. The allegations of willful violations of ADEA in Count II remain for trial.

4. A status hearing will be held on June 10, 1983 at 9:30 a.m. to set a date for submission of an amended pretrial order.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT

For the Northern District of Illinois

Eastern Division

FRANK HERMAN and FRANK MULLANEY, *Plaintiffs,*	)	
v.	)	No. 80 C 2207
NATIONAL BROADCASTING COMPANY, INC. *Defendant.*	)	

MEMORANDUM OPINION AND ORDER

Presently before the Court is the motion of defendant National Broadcasting Company, Inc. ("NBC") for summary judgment on plaintiffs' claim of wilful violations of the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. §§ 621, *et seq.* ("ADEA"). On May 31, 1983, the Court granted NBC's motion to dismiss as untimely the plaintiffs' claims of nonwilful violations of ADEA. The facts of the case are set out in the Memorandum Opinion and Order issued at that time. The following additional facts are necessary to resolve the instant motion.

1. WMAQ-TV posted a written announcement on March 14, 1978 stating the qualifications desired for six staff positions which NBC sought to fill in its newly formed Electronic Journalism ("E/J") Department:

> Experience in camera and editing techniques. News gathering experience at a major market T.V. station preferred.

Three persons were to be selected as E/J editors and three as minicam operators.

2. Willis O. Marshall ("Marshall"), WMAQ-TV's Director of Technical Operations and Engineering, allegedly was solely responsible for hiring the six E/J employees sought in the March 1978 notice.

3. Marshall asserts that the qualifications specified—experience in camera *and* editing—did not mean that only candidates with both types of experience would be considered. Rather, he says that the notice should be construed as he intended it, *i.e.,* experience in one or the other, or both.

4. Marshall asked William B. Carter ("Carter"), Supervisor of E/J Operations, to designate his top eight choices for E/J editing positions from among the applicants who were then editors or assistant editors or assistant editors in the News Department. Neither plaintiff, Frank Herman ("Herman") nor Frank Mullaney ("Mullaney"), was ranked one to eight. Carter also was asked to separately rank film crew applicants seeking minicam positions.

5. Although Marshall admits to having seen a list of the applicants which included their ages, Marshall claims that Carter's list of the top eight was composed without consideration of the applicants' ages. Marshall further states that his ultimate selections were not age biased.

6. Marshall also admits to having heard of ADEA but not to being aware of its explicit provisions, *i.e.,* ADEA protects persons between the ages of 40 and 70 from employment discrimination due to their age. It is undisputed that NBC had posted ADEA notices and had appointed an employee designated as an ADEA compliance officer.

7. None of the three persons selected as E/J editors in March 1978 was 40 years old or older; two of the three selected as minicam operators were in their forties.

8. In March 1978, Herman and Mullaney were ages 58 and 53 respectively.

9. Marshall claims that the three E/J editors selected had skills superior to those of Herman or Mullaney. Marshall notes the alleged exemplary qualifications of the three: 16 years of experience and the "best" editor at WMAQ-TV, having won several awards for outstanding achievement in editing; 11 years of editing experience and the "fastest" editor at WMAQ-TV; 7 years of editing as well as camera experience. Marshall further claims that other factors, such as recommendations of supervisors, figured in his final decisions.

10. Neither plaintiff disputes the credentials of the editors selected, nonetheless they claim that they were more qualified than the three selected. Herman had 12 years experience as a film editor as well as experience in camera and video tape editing. Mullaney had six years experience as an assistant editor. In support of his alleged superior qualifications, Mullaney notes that during the period after his rejection for a permanent E/J position, several of the pieces he edited while in NBC's temporary employ were nominated for an "Emmy" award. He also cites the fact that he did not have to be specially trained for his temporary position in the E/J department.

DISCUSSION

In order to find a defendant liable for wilful violation of ADEA, and a plaintiff entitled to liquidated damages, 29 U.S.C. § 626(b), "[t]he showing must clearly be greater than that necessary for the initial finding of ADEA liability." *Syvock v. Milwaukee Boiler Manufacturing Co., Inc.*, 665 F.2d 149, 156 n.10 (7th Cir. 1981). Thus, whether the Court need consider if NBC has wilfully violated ADEA depends first on a finding that ADEA has been violated in a nonwilful way.

The prima facie case of nonwilful age discrimination must of necessity be a flexible one. Here, Herman and Mullaney must show that they had all of the qualifications needed for the positions sought.[1] *See, e.g., Kephart v. Institute of Gas Technology,* 630 F.2d 1211, 1219-20 (7th Cir. 1980), *cert. denied,* 450 U.S. 959 (1981); *Loeb v. Textron, Inc.,* 600 F.2d 1003, 1019 (1st Cir. 1979). Plaintiffs also must prove that they were *at least as qualified* as the applicants who were selected for the E/J editing positions. The Seventh Circuit stated, albeit in a Title VII context,

> A desire to hire the more experienced or better qualified applicant is a nondiscriminatory, legitimate and common reason on which to base a hiring decision. Thus . . . plaintiff must foreclosee this possible explanation for a hiring decision before [a] prima facie case is established (citations omitted).

Holder v. Old Ben Coal Co., 618 F.2d 1198, 1201-02 (7th Cir. 1980).

Herman and Mullaney have made only conclusory allegations that they were *more* qualified than the three persons selected by Marshall to become E/J editors. Neither Herman nor Mullaney conducted any discovery of NBC personnel which might have supported their allegations or at least contradicted NBC's assertions. It is true that both plaintiffs were minimally qualified to fill the E/J positions; however, "minimally qualified" is not the same as "better qualified" or even "as qualified."

Herman's assertion of his alleged better qualifications stems primarily from his interpretation of the posted notice. His view is that NBC solicited for E/J editors with *both* editing *and* camera experience and that among the three editors selected only one had both types of experience. Herman's view

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[1] It is undisputed that plaintiffs are within the age categories protected by ADEA and that they were not hired: two other elements of the prima facie age case.

is not supported by any testimony other than his and Mullaney's. Marshall testified that the qualifications stated were alternatives and not cumulative. Some support for Marshall's position is found in an earlier notice of February 7, 1977. That notice for E/J positions reads "Qualifications Desired ... experience in camera and/or editing techniques." Clearly, the 1978 notice unlike the 1977 notice is not expressed in the disjunctive. However, on a motion for summary judgment it is the burden of the party opposing the motion to come forward with proof contradicting the movant's support. The opponent may not rest on the allegations of his pleading. Fed. R. Civ. P. 56(d). The plaintiffs "must show *specific* facts indicating that a genuine issue does indeed exist." *Posey v. Skyline Corp.*, 702 F.2d 102, 106 (7th Cir. 1982) (emphasis in original).

No specific facts contradicting Marshall's asserted intention to seek candidates with either qualification are offered. Furthermore, Marshall has given uncontradicted testimony that the three editors selected had special skills which contributed to those candidates' superior qualities, *i.e.*, the "best editor" or the "fastest" editor.

The third editor had seven years experience in editing and camera. Herman claims to have 12 years of editing experience as well as experience in camera. It is unclear whether Herman's camera experience was co-extensive with his editing, *i.e.*, 12 years of each. Assuming for purposes of this motion that it was and, therefore, that Herman had five years more joint experience than the third E/J editor selected, Herman still has failed to introduce facts which controvert Marshall's testimony that factors other than length of combined service influenced the hiring process.

Mullaney's assertion of better qualifications allegedly are supported by the facts that the work he performed during his temporary assignment was nominated for special industry recognition and that he needed no training for the temporary work. Assuming *arguendo* that Mullaney was better qualified

than the younger candidates selected, Mullaney's offer of his later honors or skills as the only support of his claims is insufficient. NBC cannot be expected to judge an applicant on his future achievements.

In *Locke v. Commercial Union Insurance Co.*, 676 F.2d 205, 206 (6th Cir. 1982), the Sixth Circuit held

> The plaintiff did nothing more than state his conclusion that he was terminated because of his age. To permit this single statement to constitute a prima facie case would place on employers a burden which Congress never intended. There is no automatic presumption that every termination of an employee between the ages of 40 and 70 results in a violation of the Age Discrimination in Employment Act. Yet to permit a plaintiff to shift the burden to the defendants of justifying a termination on such conclusory statement would have this effect.

Similarly plaintiffs' single, conclusory statement of superior qualifications fails to establish a prima facie case.

Had plaintiffs established a prima facie case, they would be entitled only to an inference of age discrimination. The ultimate burden of proof remains with the plaintiffs throughout. *Texas Department of Community Affairs v. Burdine,* 450 U.S. 248 (1981). The inference is disspelled if the employer states a nondiscriminatory business reason for the decision and that reason is not shown to be a pretext for discrimination. *See, e.g., Loeb v. Textron, supra* at 1014-15, *citing Furnco Construction Corp. v. Waters,* 438 U.S. 567 (1978); *International Brotherhood of Teamsters v. United States,* 431 U.S. 324 (1977); *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973).

NBC has stated a legitimate, nondiscriminatory reason for rejecting Herman and Mullaney and for selecting three others in their stead: the others were more qualified. "No rational enterprise that has several qualified candidates for a position selects among them by lot; it picks the best qualified." *Mason v. Continental Illinois National Bank,* 704 F.2d 361 (7th Cir. 1983) (Title VII).

In light of the uncontradicted testimony of Marshall as to the notice's intent to seek candidates with either camera or editing skills, his uncontradicted assertion that the editors selected were superior to Herman and Mullaney and the lack of any substantiated and material evidence of age discrimination,[2] this Court will not second guess the basis for NBC's business judgment. ADEA "was not intended for judicial review of business decisions." *Kephart v. Institute of Gas Technology, supra* at 1223.

Had the plaintiffs made out a prima facie case, NBC would have carried its burden of producing a legitimate non-discriminatory reason for failing to hire Herman and Mullaney for E/J editing positions. The presumption raised by the prima facie case would have been rebutted.

In that case, plaintiffs could have proved nonwilful age discrimination only by showing that the stated business reason for failing to hire them was pretextual, a cover-up for age discrimination. *Golomb v. Prudential Insurance co.,* 688 F.2d 547, 551 (7th Cir. 1982). To prove pretext, the plaintiffs would have to show that their age was a determining factor in the decision by NBC to reject them and that but for their ages they would have been hired. *Id. See also Loeb v. Textron, Inc., supra.*

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[2] The finding of no age discrimination is not based upon NBC's assertions that NBC's workforce includes a large majority of persons older than forty, Marshall and Carter were over fifty when the disputed decisions were made or minicam operators were hired who were in their forties. First, the instant claim charges a refusal to *hire*; it does not allege that NBC fires workers within the protected age range. NBC could violate ADEA if it failed to hire older workers but did not fire those in place. Second, ADEA protects persons anywhere along the continuum of ages 40 to 70. The plaintiffs claim that NBC discriminates against persons fifty or over. NBC could have a workforce composed entirely of persons between the ages of 40 and 49 and still violate ADEA if it would not hire persons 50 or older due to their age.

The plaintiffs, however, have offered no proof which casts doubt on the veracity of NBC's reasons for making its hiring decisions. It is irrelevant that Marshall may have known or should have known the range of ADEA's protection or that Herman and Mullaney fell within the range. Judge Getzendanner recently granted summary judgment to an ADEA defendant where the employer's imputed knowledge of plaintiff's birthdate allegedly presented a genuine issue of fact:

> To embrace [plaintiff's] logic, I would thus have to agree that an employer is never entitled to summary judgment whenever a plaintiff establishes that the employer knew or should have known it was replacing an age-protected employee with a younger worker. Clearly this cannot be the law, at least when there is also evidence upon which to conclude that the employer acted for nondiscriminatory reasons. . . . Plaintiff's proposed theory . . . would seemingly mandate a "full dress trial" in virtually all cases.

Roane v. GTE Automatic Electric, Inc., 80 C 3551 (N.D. Ill. 1982), at 7-8.

So too in the instant case. Herman and Mullaney cannot defeat NBC's motion simply by claiming that Marshall knew or should have known from a list within his control that Herman and Mullaney were older than the three E/J editors selected.

Certainly plaintiffs' assertion that "age must have been the determining factor because they can think of no other reason for their rejections" does not create a material issue of fact in the face of NBC's nondiscriminatory reason for its hiring decisions. *See, e.g., Locke v. Commercial Union Insurance Co., supra; Ortiz v. Ciba-Geigy Corp.*, 87 F.R.D. 723 (N.D. Ill. 1980) (Title VIII). Plaintiffs offer an affidavit of a person who was rejected for a position at NBC in 1974. Even if the facts asserted in the affidavit are true, *i.e.*, that the applicant was rejected by an NBC executive on the ground that no one over 50 is hired for an NBC staff position, the affidavit is worthless here. Herman and Mullaney applied for positions in 1978, not

in 1974; the positions that they sought were different than that sought by the affiant; and the NBC employee who allegedly made the discriminatory remarks was removed from his position in 1976. The facts asserted in the affidavit, the only affidavit other than statements of the plaintiffs, do not present a triable controversy.

Having failed to establish nonwilful age discrimination, it is unnecessary to consider the asserted claim of wilful age discrimination. For the stated reasons, IT IS THEREFORE ORDERED that summary judgment on the remaining claim of wilful violation of ADEA is granted in favor of NBC.

ENTER:

WILLIAM T. HART
United States District Judge

Dated: Sept. 19, 1983

APPENDIX D

Opinion by Judge Eschbach

JUDGMENT—ORAL ARGUMENT

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

September 26, 1984.

Before

Hon. WILBUR F. PELL, JR., Circuit Judge
Hon. JESSE E. ESCHBACH, Circuit Judge
Hon. INZER B. WYATT, Senior District Judge*

FRANK HERMAN and FRANK MULLANEY, *Plaintiffs-Appellants,* No. 83-2834 *vs.* NATIONAL BROADCASTING COMPANY, INC., *Defendant-Appellee.*	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division No. 80 C 2207 WILLIAM T. HART, Judge

This cause was heard on the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED IN PART, REVERSED AND REMANDED IN PART, with costs on appeal awarded to plaintiffs, in accordance with the opinion of this Court filed this date.

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* The Honorable Inzer B. Wyatt, Senior District Judge, Southern District of New York, sitting by designation.

APPENDIX E

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

October 29, 1984.

Before

Hon. WILBUR F. PELL, JR., Circuit Judge
Hon. JESSE E. ESCHBAH, CIRCUIT JUDGE
HON. INZER B. WYATT, Senior District Judge*

FRANK HERMAN and FRANK MULLANEY, *Plaintiffs-Appellants,* vs. NATIONAL BROADCASTING COMPANY, INC., *Defendant-Appellee.*	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 80 C 2207 WILLIAM T. HART, *Judge.*

No. 83-2834

ORDER

On consideration of the petition for rehearing and suggestion for rehearing *en banc* filed in the above-entitled cause by defendant-appellee, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

IT IS FURTHER ORDERED that defendant-appellee's motion to dismiss appeal for lack of jurisdiction is hereby, DENIED.

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* The Honorable Inzer B. Wyatt, Senior District Judge for the Southern District of New York, sitting by designation.

APPENDIX F

AFFIDAVIT OF WILLIS O. MARSHALL

WILLIS O. MARSHALL, being first duly sworn on oath, deposes and says:

1. From 1973 through 1978, I was the Director of Technical Operations and Engineering for NBC's Chicago station, WMAQ-TV. I was solely responsible for the hiring of permanent E/J employees in the spring of 1978.

2. Prior to March 1978, I determined that WMAQ-TV needed to fill six E/J positions—3 editors and 3 field (minicam). Accordingly, in March 1978 I prepared a Job Posting announcing that WMAQ-TV would accept job applications for six E/J positions.

3. I reviewed the applications received in response to the Job Posting and consulted with William B. Carter, Supervisor, E/J Operations, concerning the applicants. As Manager of News Technical Operations, Mr. Carter had been the supervisor of film department employees, including Frank Herman and Frank Mullaney, who applied for E/J positions in 1978.

4. Prior to making my selections for the E/J positions in 1978, I asked Mr. Carter to rank separately (1) the editors and assistant editors from the film department who had applied for E/J editing positions, and (2) the film crew members (camera, sound, lights) who had applied for E/J field positions. Because of my limited contact with the film editors and assistant film editors, I relied to a large extent upon Mr. Carter's recommendations for the E/J editing positions.

5. Mr. Carter ranked Alan Stecker, John Martin and Dwight Samuelson 1, 2 and 3, respectively, for the E/J editing positions. Mr. Carter also ranked 5 additional film editors and assistant editors 4 through 8, respectively. Mr. Carter did not include either Frank Herman or Frank Mullaney in his rankings of the top eight film editors and assistant film editors.

6. I selected Messrs. Stecker, Martin and Samuelson for the three E/J editing positions because, based upon my evaluation of them and Mr. Carter's recommendations, I believed that they were the three best applicants for the E/J editing positions which I was going to fill in 1978.

7. I selected Mr. Stecker because he was not only a good editor but had proven himself to be a good film cameraman based on his prior experience at WMAQ-TV. Mr. Stecker's dual experience as an editor and cameraman made him a highly desirable applicant because we needed some E/J employees with a variety of skills who would increase our flexibility by enabling us to utilize them in more than one role on news stories.

8. I selected Mr. Martin because I considered him to be the best editor at WMAQ-TV. Indeed, over the years Mr. Martin had won several Emmy Awards for outstanding achievement in editing.

9. I selected Mr. Samuelson because he was not only a good editor but also was the fastest editor at WMAQ-TV. His ability to edit quickly was an important qualification for an editor in a news department, where there frequently is a need for someone who can take raw videotape and quickly edit it into a coherent news story under the constant pressure of short deadlines.

10. For the reasons stated in paragraphs 7 through 9, above, I considered Messrs. Stecker, Martin and Samuelson to be the three best applicants for the three E/J editing positions.

11. I did not consider the ages of any of the applicants (including any of the employees listed on Plaintiff's Trial Exhibit 1) in making my selections.

WILLIS O. MARSHALL
Willis O. Marshall

Subscribed and Sworn to before me
this 20 day of June, 1983.

JANET SHAFFLER
Notary Public
My Commission Expires October 29, 1985.

APPENDIX G

AFFIDAVIT OF WILLIAM B. CARTER

WILLIAM B. CARTER, being first duly sworn on oath, deposes and says:

1. From prior to June, 1977 I was WMAQ-TV's Manager, News Technical Operations. In June, 1977, I became Supervisor, E/J Operations.

2. As Manager, News Technical Operations, I was the supervisor of film department employees, including Frank Herman and Frank Mullaney, who applied for E/J positions in 1978.

3. Plaintiffs' Trial Exhibit 1 is a copy of a document which I prepared. The circled hand-written numbers which appear beside the names listed on the document were placed there by me.

4. Prior to March, 1978, I became aware that Mr. Marshall was going to post and fill six E/J positions—3 editors and 3 field (minicam). Before he made his selections for the E/J positions in 1978, Mr. Marshall asked me to rank separately (1) the editors and assistant editors from the film department who had applied for E/J editing positions and (2) the film crew members (camera, sound, lights) who had applied for E/J field positions. My rankings for the editors are included on pages 2 and 3. I ranked Alan Stecker, John Martin and Dwight Samuelson 1, 2 and 3, respectively for the E/J editing positions.

5. Based on my experience with them in the film department, I believed Messrs. Stecker, Martin and Samuelson were the three best applicants for the three E/J editing positions which Mr. Marshall was going to fill in 1978. I did not consider the ages of any of the employees listed on Plaintiffs' Trial Exhibit 1 in making my recommendations.

6. I did not rank or recommend Frank Herman or Frank Mullaney for the E/J editing positions in 1978 because I believed that eight editors or assistant editors were better qualified than either Herman or Mullaney for the three E/J editing positions.

WILLIAM B. CARTER
William B. Carter

Subscribed and Sworn to before me
this 16th day of June, 1983.

MARY C. DOYLE
Notary Public

Supreme Court, U.S.
FILED
JAN 14 1985
ALEXANDER L. STEVAS
CLERK

No. 84-984

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

NATIONAL BROADCASTING COMPANY, INC.,
Petitioner,

v.

FRANK HERMAN AND FRANK MULLANEY,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE SEVENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Is a defendant entitled to summary judgment in an age discrimination action merely because it offers subjective reasons for hiring persons other than plaintiffs, or, where, as here, plaintiffs having proved a prima facie case and presented evidence rebutting defendant's "reasons" for refusing to hire, are not plaintiffs entitled to a plenary trial to prove the pretextual nature of the defense?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

NATIONAL BROADCASTING COMPANY, INC.,
Petitioner,

v.

FRANK HERMAN AND FRANK MULLANEY,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE SEVENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Respondents filed suit under the Age Discrimination Employment Act of 1967, as amended for willful and nonwillful violation of the Act. The district court first granted summary judgment in favor of Petitioner on the nonwillful count and later granted summary judgment in behalf of Petitioner on the willful count. The Court of Appeals[1] affirmed as to the

[1] The opinion of the Court of Appeals appears in Petitioner's Appendix A, App. 1a.

nonwillful count[2] and reversed on the willful count.[3] Respondent submitted substantial documentation to the district court resisting the motions for summary judgment. The Court of Appeals reviewed this documentation in detail and the Court's review represents, at the juncture of the proceedings at which the district court made its decision, the most succinct recitation of the facts. The Court of Appeals states verbatim (Petitioner's Appendix, App 6a, *et seq.*):

> A review of the submitted evidentiary materials reveals, in fact, that the plaintiffs can establish a prima facie case at trial. The plaintiffs were within the protected age group (Herman was 58 and Mullaney was 53) when their applications for E/J positions were rejected in March 1978. *See Monroe v. Equal Employment Opportunity Commission,* Nos. 83-1245 et al., slip op. at 13 (7th Cir. May 30, 1984); *Blackwell v. Sun Electric Corp.,* 696 F.2d 1176, 1180 (6th Cir. 1983). NBC, moreover, concedes that the plaintiffs "had minimal qualifications for the E/J editing positions"; and William Carter, NBC's supervisor of film department employees, testified in his deposition that he hoped to find E/J positions for "as many [film] people as possible." In short, Herman and Mullaney were the type of applicants that NBC sought, and they possessed "qualifications similar" to those actually selected. *Loeb v. Textron, Inc.,* 600 F.2d 1003, 1013 (1st Cir. 1979); *Holder v. Old Ben Coal Company,* 618 F.2d 1198, 1202 (7th Cir. 1980) ("plaintiff must show that the employer was seeking applicants of qualifications comparable to plaintiff's").
>
> The concept of a prima facie case, however, should not distract us from the real issue—whether age was a determining factor in NBC's March 1978 decisions. *See Monroe v. Equal Employment Opportunity Commission, supra,* at 12; *see also Texas Department of Community*

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[2] The district court's opinion appears in Petitioner's Appendix B, App. 11a. The Court of Appeals' affirmance of summary judgment relative to the nonwillful count is the subject of a cross-petition for certiorari filed by Respondent.

[3] The district court's opinion appears in Petitioner's Appendix C, App. 20a.

Affairs v. Burdine, 450 U.S. 248, 256 (1981) (plaintiff, at all times, retains the burden of persuasion). A prima facie case is not a complete shield against summary judgment. *See Steckl v. Motorola, Inc.,* 703 F.2d 392, 393 (9th Cir. 1983). NBC produced a legitimate, nondiscriminatory reason for the rejections by submitting affidavits stating that qualifications, not age, determined the 1978 selections. *See Burdine, supra,* at 254. Consequently, the issue became (and still is) whether the evidence before the district court could support a jury verdict finding age discrimination. *See Mason v. Continental Illinois National Bank,* 704 F.2d 361, 366 (7th Cir. 1983); *accord Douglas v. Anderson,* 656 F.2d 538, 535 n.7 (9th Cir. 1981). We now turn to that evidence.

Willis Marshall, the NBC executive who made the hiring decision, stated in his affidavit that he selected the "three best applicants for the three E/J editing positions." Similarly, William Carter, the supervisor who advised Marshall on the matter, stated that he believed those chosen "were the three best applicants." Yet in his deposition, Marshall acknowledged that this type of hiring decision involves "subjective evaluation[s]." We understand this phrase to mean that reasonable employers could disagree about who were the best applicants; and, in any event, matters of preference that are not quantifiable were involved in the selection process. It is not wrong, and certainly not per se illegal, for an employer to exercise his business judgment as he sees fit. Yet a description such as "best" is not compelling evidence that the applicants' relative qualifications were such that no employer would have considered age. *See generally Loeb v. Textron, Inc.,* 600 F.2d 1003, 1013 n.9 (1st Cir. 1979).

NBC's defense is not particularly strengthened by examining the describable and objective qualifications of the plaintiffs and those hired—Messrs. Stecker, Martin, and Samuelson. The evidence indicates that Herman and Mullaney were the more experienced film editors (19 years

and 15 years, respectively).[4] Herman also had videotape experience, something that none of those hired claimed on their applications. Marshall stated in his affidavit that he valued Stecker's experience as a cameraman, but Herman also had such a background. Marshall further declared that Samuelson "was the fastest editor at WMAQ-TV," but speed does not necessarily translate into quality, and there was no showing that a fast film editor can become a fast videotape editor. Finally, NBC submitted no evidence to denigrate the plaintiffs' talents.

We do not suggest that Herman and Mullaney were the most qualified applicants. We describe the showings on this question only to point out that NBC's position was not overwhelming. Nevertheless, if the plaintiffs had no proof beyond a bare-bones prima facie case, we might hold that the March 1978 allegations should be removed from the case. But the plaintiffs' evidence did not stop at the prima facie line.

In 1976, as the change from film to videotape was in its early stages, William Carter met with Frank Jordan, described by Carter as the person "responsible for personnel during the changeover." Jordan, who was based in Washington, D.C., met with Carter in Chicago, where the two discussed moving people into E/J positions. Jordan asked Carter to prepare a memorandum listing the names of people in film positions, their company seniority, their proposed utilization, and *their dates of birth.* Carter collected the information, prepared the memorandum for Jordan, and gave a copy to Willis Marshall. Carter later added his personal rankings to the memorandum, which was then used by Marshall in making his March 1978 decisions. If age was not a factor in the hiring decisions,

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[4] This is the Court's footnote 3:

In its memorandum below, NBC stated that Martin "had 16 years of editing experience with WMAQ-TV." But the documents produced by NBC indicate that, although Martin had been with NBC for 16 years, he had 12 years of editing experience. This inconsistency is not significant, however, because one of those hired, Stecker, had only 7 years of editing experience.

why did the memorandum requested by a top NBC executive, and used by those immediately responsible for hiring, contain such information? There may, of course, be a nondiscriminatory explanation, but that possibility does not detract from the evidentiary value of the document.

Moreover, the plaintiffs submitted an affidavit of Richard Ortner, which states that in a job interview with WMAQ-TV's General Manager in 1974, he was told, "Being 50 years old is an absolute no, no for being hired on staff." The General Manager, to be sure, left the Chicago station in 1976, but the transfer to videotape was already in progress. And, although NBC discounts the Ortner affidavit, past discriminatory acts of an employer are evidence of a "custom" or "policy" of discrimination. *See Morris v. Washington Metropolitan Area Transit Authority,* 702 F.2d 1037, 1045 (D.C. Cir. 1983).

Finally, the plaintiffs have statistical support for their case. The usefulness of statistical evidence depends on the circumstances of the case, *compare Reeves v. General Foods Corp.,* 682 F.2d 515, 525 (5th Cir. 1982), *with Kephart v. Institute of Gas Technology,* 630 F.2d 1217, 1224 (7th Cir. 1980), *cert. denied,* 450 U.S. 959 (1981), and we will not assess the force of the instant data.[5] We will note that the 20 persons hired pursuant to the 1976, 1977, and 1978 job postings were all under 50 years old. To rebut the plaintiffs' view of the statistics, at oral argument NBC directed our attention to a document indicating that 16 film employees under 50 years old were not retained in the transition. That same document, however, shows that 33 persons *under* 50 were hired in new jobs, whereas all 11 employees *over* 50 were dismissed.

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[5] This is the Court's footnote 4:

The plaintiffs assert that an expert will testify that the statistics establish that age did play a role in NBC's hiring decisions. However, no affidavit to that effect was filed, *see* Fed. R. Civ. P. 56(e), and thus the district court properly ignored the assertion.

> In conclusion, we disagree with the district court's statement that "plaintiffs . . . have offered no proof which casts doubt on the veracity of NBC's [proffered] reasons for making its hiring decisions." The district court may have believed that the plaintiffs needed direct evidence of discriminatory intent (such as an admission), but that plainly is not the law, *see United States Postal Service Board of Governors v. Aikens,* 103 S. Ct. 1478, 1481 n.3 (1983). As the Supreme Court declared in *Poller v. Columbia Broadcasting System, Inc.,* 368 U.S. 464, 472 (1962), "we cannot say on this record that 'it is quite clear what the truth is.' "

REASONS FOR NOT GRANTING THE WRIT

Petitioner has presented nothing new or compelling. Simply stated, the district court was wrong in granting summary judgment and the Court of Appeals reversed. There was no deviation from *Texas Department of Community Affairs v. Burdine,* 450 U.S. 248 (1981). The Court of Appeals, in an elaborate recitation of the potential facts already presented in support of and in opposition to summary judgment, merely held that based on Respondents' showing, they should not be denied a plenary trial to attack the veracity of Petitioner's proffered reasons for the refusals to hire, *i.e.,* to show that the reasons were pretextual.

Petitioner is not candid with this Court when it claims that the Court of Appeals held that "an employer must show that 'the applicants' relative qualifications were such that *no* employer would have considered age' " (Petition, pg. 10). (Italics are those of Petitioner). How terrible and insulting it is to quote out of context to any court, let alone this Court. The actual and total quotation of the Court of Appeals is as follows:

> Willis Marshall, the NBC executive who made the hiring decision, stated in his affidavit that he selected the

> "three best applicants for the three E/J editing positions." Similarly, William Carter, the supervisor who advised Marshall on the matter, stated that he believed those chosen "were the three best applicants." Yet in his deposition, Marshall acknowledged that this type of hiring decision involves "subjective evaluation[s]." We understand this phrase to mean that reasonable employers could disagree about who were the best applicants; and, in any event, matters of preference that are not quantifiable were involved in the selection process. It is not wrong, and certainly not per se illegal, for an employer to exercise his business judgment as he sees fit. Yet a description such as "best" is not compelling evidence that the applicants' relative qualifications were such that no employer would have considered age. (Petitioner's Appendix, App. 7a-8a).[6]

As can be seen, all the Court of Appeals said was that an employer might have considered age and that the characterization of selecting someone because he was "best" on the basis of a subjective evaluation was not enough in the light of the proferred proof of the plaintiffs to grant Petitioner's motion for summary judgment. What Petitioner is saying is that all it, or any defendant, has to do, is respond in a parrot like fashion that

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[6] Petitioner has done it again. In the Court of Appeals, Petitioner's counsel included a deleted line from the Seventh Circuit's decision in *Holder v. Old Ben Coal Company*, 618 F.2d 1198, 1202 (C.A. 7, 1980) which the Seventh Circuit had removed when the petition for rehearing was denied. The inclusion of the line changed the import of the *Holder* decision and the deleted line was used by Petitioner to argue to the Court of Appeals that "plaintiffs cannot meet the threshold requirements of a prima facie case of age discrimination" (Petitioner's Appendix, 6a). The Court of Appeals stated "NBC has, however, misquoted *Holder*." (Petitioner's Appendix, 6a). The Court added, "Thus four years after the opinion was modified and correctly published in the *Federal Reporter*, NBC continues to cite and rely on a deleted sentence. We, of course, do not suggest that NBC's attorneys have intentionally misrepresented *Holder*, but lawyerlike steps to ensure accuracy plainly were not taken." (Petitioner's Appendix, 6a).

someone was the "best" and that this should foreclose further inquiry. How convenient, how erroneous and how frivolous. If every defendant could say that it was not guilty and then simply walk away, what a wonderful life it would be for defendants who had violated the law. Indeed, here, the Seventh Circuit even went on to state, "We do not suggest that Herman and Mullaney were the most qualified applicants. We describe the showings on this question only to point out that NBC's position was not overwhelming. Nevertheless, if the plaintiffs had no proof beyond a bare-bones prima facie case, we might hold that the March 1978 allegations should be removed from the case. But the plaintiffs' evidence did not stop at the prima facie line." (Petitioner's Appendix, App. 8a).

Respondents are entitled to have a jury hear their evidence and make the determination as to whether Respondents can prove that Petitioner's proffered defense is pretextual. This is the law. This has been the law and the Court of Appeals did not alter it.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied. Because of the frivolity of Petitioner's petition, Respondents request that they be awarded their attorneys' fees.

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No. 84-984

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

NATIONAL BROADCASTING COMPANY, INC.,
Petitioner,

v.

FRANK HERMAN AND FRANK MULLANEY,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

SUPPLEMENTAL BRIEF

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SUPPLEMENTAL BRIEF

Petitioner, National Broadcasting Company, Inc. ("NBC"), submits this Supplemental Brief pursuant to Rule 22.6 because of this Court's decision in *Trans World Airlines, Inc.* v. *Thurston,* 53 U.S.L.W. 4024 (U.S. Jan. 8, 1985), which was announced after its Petition for Certiorari was filed.

In *Thurston,* this Court established the proper legal standard for determining what constitutes a "willful" violation under the liquidated damages provision of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 626(b). The Court held that a violation of the Act is willful if

the employer "either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA." 53 U.S.L.W. at 4028. A standard under which a violation of the Act is willful if the employer "simply knew of the potential applicability of the ADEA" — the "in the picture standard" — was rejected. *Id.*[1]

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[1] This Court left open whether the same standard applies to the extended statute of limitations for willful violations under Section 6(a) of the Portal-To-Portal Act, 29 U.S.C. § 255(a). Section 6(a), which applies to ADEA violations, 29 U.S.C. § 626(e)(1), extends the statute of limitations from two years to three years if the violation is "willful." In addition to the Seventh Circuit in the instant case (App. 4a), most courts of appeals have applied the same willfulness standards to both the liquidated damages provision and the three-year statute of limitations. *See, e.g., EEOC* v. *Prudential Federal Savings & Loan Association,* 741 F.2d 1225, 1233 (10th Cir. 1984), *judgment vacated and remanded for further consideration in light of Thurston,* 53 U.S.L.W. 3506 (U.S. Jan. 14, 1985); *Spagnuolo* v. *Whirlpool Corp.,* 641 F.2d 1109, 1113-1114 (4th Cir.) *cert. denied,* 454 U.S. 860 (1981); *Hedrick* v. *Hercules, Inc.,* 658 F.2d 1088, 1096 (5th Cir. 1981); *Wehr* v. *Burroughs Corp.,* 619 F.2d 276, 282-283 (3rd Cir. 1980). *Contra Kelly* v. *American Standard, Inc.,* 640 F.2d 974, 979 (9th Cir. 1981).

ARGUMENT

1. The Court of Appeals' Finding of Willfulness Is Highly Suspect Under Thurston.

NBC has petitioned for review (or summary reversal) of the Seventh Circuit's decision reversing summary judgment in its favor on claims of willful discrimination under ADEA,[2] because the standard adopted by the Court of Appeals is contrary to *Texas Department of Community Affairs* v. *Burdine,* 450 U.S. 248 (1981), and would permit improper judicial second-guessing of an employer's business judgments. This Court's *Thurston* decision provides another compelling reason for reviewing and overturning that decision.

In the instant case, the Court of Appeals applied the ADEA liquidated damages standard for a willful violation to NBC's conduct in rejecting respondents' applications for employment, citing *Syvock* v. *Milwaukee Boiler Manufacturing Co.,* 665 F.2d 149, 156 (7th Cir. 1981). (App. 4a.) In its only discussion of this issue, the court below held that "NBC, which posted ADEA notices and employed an ADEA compliance officer, was in no position to plead ignorance of the law." *(Id.)* Thus, NBC's knowledge of and compliance with ADEA, without more, were deemed sufficient to establish a willful violation of the Act for purposes of the extended (three-year) statute of limitations, 29 U.S.C. § 626(e)(1).

In *Thurston,* this Court struck down a similar decision with respect to the willfulness standard for liquidated damages. A broad, "in the picture" standard, was rejected because it would result in a finding of willfulness in almost every case. "*As*

[2] The decision below upheld partial summary judgment for NBC on respondents' claims of nonwillful discrimination for failure to comply with ADEA's two-year statute of limitations. This aspect of the Court of Appeals' decision is the subject of a Cross-Petition for Certiorari in No. 84-1133.

employers are required to post ADEA notices, it would be virtually impossible for an employer to show that he was unaware of the Act and its potential applicability." 53 U.S.L.W. at 4028 (emphasis added).

Precisely the same reasoning applies to the decision of the court below. A standard of "willfulness" measured only by an employer's awareness of the Act would result in an extended statute of limitations in every case. Yet that is exactly what the decision below mandated.

Respondents never offered any proof that NBC had violated ADEA "knowingly" or "recklessly" in rejecting their applications for the positions they sought. The *only* finding of the Court of Appeals on this point was that NBC was aware of ADEA, had taken steps to enforce it, and thus "was in no position to plead ignorance of the law." (App. 4[illegible]) Accordingly, NBC's knowledge of and compliance with ADEA established a willful violation as a matter of law.

In *Thurston,* the court below similarly misapplied the willfulness standard and this Court reversed. 53 U.S.L.W. at 4028. Whether the Seventh Circuit here incorrectly adopted an "in the picture" standard or misapplied the *Syvock* standard, the decision below — holding that NBC's compliance with ADEA established a willful violation as a matter of law — cannot be squared with this Court's decision last month in *Thurston.*

2. **Summary Disposition Is Warranted.**

Petitioner suggested in its Petition for Certiorari (at pp. 13-14) that summary disposition may be warranted. This Court's intervening decision in *Thurston* provides an additional reason for summary disposition. The court below employed a liquidated damages standard for willfulness. In holding that an employer's conduct was willful by virtue of posting ADEA notices and employing an ADEA compliance officer — in short, simply because it *complied* with the Act — the decision below

would mandate a finding of willfulness in *every* case. In *Thurston,* this Court unanimously rejected such a definition of willfulness for that identical reason. Because the decision below is fundamentally inconsistent with *Thurston,* summary reversal may be warranted. Rule 23.1; *see also Board of Trustees of Keene State College* v. *Sweeney,* 439 U.S. 24 (1978); *Chardon* v. *Fernandez,* 454 U.S. 6 (1981). In the alternative, petitioner respectfully suggests that the Court may wish to vacate the judgment and remand the case for further consideration in light of its *Thurston* decision. *EEOC* v. *Prudential Federal Savings & Loan Association,* 741 F.2d 1225, 1233 (10th Cir. 1984), *judgment vacated and remanded for further consideration in light of Thurston,* 53 U.S.L.W. 3506 (U.S. Jan. 14, 1985).

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IN THE

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OCTOBER TERM, 1984

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Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE SEVENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION TO PETITIONER'S SUPPLEMENTAL BRIEF

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

NATIONAL BROADCASTING COMPANY, INC.,
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RESPONDENTS' BRIEF IN OPPOSITION TO PETITIONER'S SUPPLEMENTAL BRIEF

Pursuant to Supreme Court Rule 22.6, Respondents, FRANK HERMAN and FRANK MULLANEY, submit their brief in opposition to Petitioner's supplemental brief which contends that this Court's decision in *Trans World Airlines, Inc. v. Thurston,* 53 U.S.L.W. 4024 (January 8, 1985) should beneficially affect Petitioner's Petition.

REASONS FOR NOT GRANTING THE WRIT

In our initial brief in opposition to the petition for certiorari we stated, *inter alia,* that the Seventh Circuit's decision, in this case of willful age discrimination, elaborately recited the potential facts already presented in support of and in opposition to summary judgment and merely held that based on Respondent's showing, they should not be denied a plenary trial to attack the veracity of Petitioner's proffered reasons for the refusals to hire, *i.e.,* to show that the reasons were pretextual.

There was no deviation from *Texas Department of Community Affairs v. Burdin,* 450 U.S. 248 (1981).

This Court's decision in *Trans World Airlines, Inc. v. Thurston,* 53 U.S.L.W. 4024 (January 8, 1985), presents nothing new or compelling to Petitioner's cause. *Thurston* stated that there was a willful violation of the Act "if 'the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA.' " (at pg. 4028). The Court's intention was to define what constituted a willful violation for purposes of establishing liquidated damages. This Court did not believe that such damages should be awarded in virtually every case if the employer "simply knew of the potential applicability of the ADEA" (pg. 4028). However, this is not the posture of our case. We are at a preliminary stage of establishing a violation and not damages.

As noted, the Seventh Circuit recited extensive facts in support of its reversal of the summary judgment order. Contrary to Petitioner's argument in its supplemental brief, the Seventh Circuit did not base its findings on the sole finding that Petitioner posted notices of the Act. And contrary to Petitioner's supplemental brief argument, Respondent *did* offer proof to the courts below that NBC had violated the Act "knowingly" and/or "recklessly" in rejecting their applications for the positions they sought. The Seventh Circuit identified and relied upon two smoking guns of willful discrimination. One was when one of Petitioner's executives specifically requested that he be provided with the age of each applicant.[1] The second was when another executive of the Petitioner told an applicant for a job that he would not be hired because he was over 50 years of age.[2] The Seventh Circuit Court also identified and relied upon employment statistics which showed that no applicant over the age of 50 was hired while 33 applicants under the age of 50

[1] App. 9a. to Petitioner's Petition.

[2] App. 9a.

were hired.[3] These, *inter alia,* were what the Seventh Circuit considered as potentially proving that the Petitioner knew or showed a reckless disregard for whether its conduct violated the Act. Respondents are entitled to their day in court to prove these allegations.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied. Because of the frivolity of Petitioner's petition and its supplemental brief, Respondents request that they be awarded their attorneys' fees and costs.

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[3] App. 10a.